KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
THE McPHERSON BUILDING
901 FIFTEENTH STREET, N.W., SUITE 1100
WASHINGTON, D.C. 20005

(202) 682-3500

TELECOPY NUMBER
(202) 682-3580

425 PARK AVENUE
NEW YORK, N.Y. 10022
(212) 836-8000

1999 AVENUE OF THE STARS
SUITE 1600
LOS ANGELES, CA 90067
(213) 788-1000

ADMIRALTY CENTRE
TOWER I, 32ND FLOOR
18 HARCOURT ROAD
HONG KONG
(852) 865-7676

SQUARE DE MEEÛS 30
1040 BRUSSELS, BELGIUM
(322) 514-4300

WRITER'S DIRECT DIAL NUMBER

(202) 682-3526

December 17, 1992

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 92-3
RM-7874 and RM-7958

Dear Ms. Searcy:

Submitted herewith for filing, on behalf of our client, Schuyler H. Martin, permittee of Radio Station KPXA(FM), Sisters, Oregon, are an original and four copies of his Opposition To Petition For Reconsideration in the above-referenced proceeding.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

By: _____
Irving Gastfreund

Enclosures

DOC #12078794

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.203(b)	)	MM Docket No. 92-3
Of The Commission's Rules	)	RM-7874 and
Table of Allotments	)	RM-7958
FM Broadcast Stations	)	
(Prineville and Sisters, Oregon)	)	

TO: **Chief, Mass Media Bureau**

OPPOSITION TO PETITION FOR RECONSIDERATION

Irving Gastfreund, Esq.

Kaye, Scholer, Fierman, Hays & Handler
The McPherson Building
901 15th Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 682-3526

Counsel to Schuyler H. Martin

December 17, 1992

SUMMARY

The Petitioners' Petition For Reconsideration is both procedurally defective and substantively devoid of merit. The petition is late-filed, merely reargues matters fully considered and disposed of by the Bureau in its Report and Order, and contains new factual materials which could have been and should have been submitted, if at all, earlier in this proceeding. These new matters should be summarily stricken pursuant to Section 1.106(c) of the Commission's Rules. Furthermore, even when considered on its alleged "merits", the Petition For Reconsideration fails to provide the basis either for reconsideration of the Report and Order in this proceeding, or for initiation of a formal Section 403 investigation. For all these reasons, the Petition For Reconsideration should be summarily dismissed without consideration as procedurally defective, or, alternatively, denied.

Table Of Contents

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

DEC 17 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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TO: Chief, Mass Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

SCHUYLER H. MARTIN ("Martin"), permittee of Radio Station KPXA(FM), Sisters, Oregon, by his attorneys, pursuant to Section 1.429(f) of the Commission's Rules, hereby submits his instant Opposition to the Petition For Reconsideration filed in this proceeding on November 13, 1992 on behalf of the licensees of certain radio stations operating in the Bend, Oregon area (hereinafter collectively referred to as "Petitioners").[1] In support whereof, it is shown as follows:

I. Introduction

On October 7, 1992, the Allocations Branch of the Mass Media Bureau's Policy and Rules Division released its Report and Order, __ FCC Rcd __, DA 92-1276 (released October 7, 1992), in which the Allocations Branch granted Martin's request to substitute Channel 281C1 for Channel 281A in Sisters, Oregon, and to modify Martin's construction permit for Radio Station KPXA(FM) to specify operations on Channel 281C1 in Sisters, Oregon.

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[1] The Petitioners included the following broadcast licensees: Central Oregon Broadcasting, Inc. (licensee of KBND, Bend, Oregon; and KLRR, Redmond, Oregon); Redmond Broadcast Group, Inc. (licensee of KPRB and KSJJ, Redmond, Oregon); Highlakes Broadcasting Company (licensee of KRCO and KIJK-FM, Prineville, Oregon; JJP Broadcasting, Inc. (licensee of KQAK, Bend, Oregon); Oak Broadcasting, Inc. (licensee of KGRL and KXIQ, Bend, Oregon); Sequoia Communications (licensee of KICE, Bend, Oregon); and The Confederated Tribes of the Warm Springs Reservation of Oregon (licensee of KTWS, Bend, Oregon; and KTWI, Warm Springs, Oregon).

In granting this upgrade of the KPXA(FM) technical facilities, the Allocations Branch rejected the Petitioners' contentions that Martin and the party that initiated this proceeding with the filing of a petition for rulemaking -- i.e., Danjon, Inc. ("Danjon") -- had engaged in an abuse of the Commission's processes in connection with the filing of Danjon's rulemaking petition and in connection with the filing of Martin's counterproposal in this proceeding. As noted by the Allocations Branch in its Report and Order, supra, the Petitioners had argued below that Danjon's request for Channel 284A at Prineville, Oregon, was a sham proposal filed solely to accommodate the interests of Martin. The Petitioners had requested institution of a formal investigation by the Commission, pursuant to Section 403 of the Communications Act, into the filing of Danjon's rulemaking proposal and Martin's counterproposal.

In rejecting the Petitioners' contentions, the Allocations Branch stated as follows:

> "We believe that ... [Petitioners] ... had not provided sufficient evidence to warrant an investigation of the circumstances surrounding the filing of either the petition or counterproposal. In fact, the ... [Petitioners] ... acknowledge that ... [their] ... contentions are based on 'largely circumstantial evidence' [Footnote omitted.] The ... [Petitioners] ... have not shown that Danjon's request is anything more than a request for what Danjon believed to be a first local FM allotment at Prineville or that the proposal was filed to assist the uncontested grant of Martin's proposal. We also find that no ulterior motive necessarily attaches to the choice of Channel 284A as Prineville's proposed allotment. We frequently receive counterproposals to proposed allotments that are resolved by the allotment of a channel other than that originally requested. Some of the alternate channels, in fact, may be considered as more attractive than the originally requested channel since a less restrictive or no site restriction is required. [Footnote omitted.]"
>
> Report and Order, supra, at ¶5.

In their November 13, 1992 Petition For Reconsideration, the Petitioners argue that the Allocations Branch erred in refusing to initiate a formal investigation under Section 403 of the Communications Act. In this regard, the Petitioners argue that they have established the existence of a substantial and material question of fact warranting initiation of a formal Section 403 investigation.

For the reasons set forth below, the Petitioners' Petition For Reconsideration is both procedurally defective and substantively devoid of merit. As shown below, the petition is late-filled, merely reargues matters fully considered and disposed of by the Bureau in its Report and Order, and contains new factual materials which could have been and should have been submitted, if at all, earlier in this proceeding. These new matters should be summarily stricken pursuant to Section 1.106(c) of the Commission's Rules. Furthermore, even when considered on its alleged "merits", the Petition For Reconsideration fails to provide the basis either for reconsideration of the Report and Order in this proceeding, or for initiation of a formal Section 403 investigation. For all these reasons, the Petition For Reconsideration should be summarily dismissed without consideration as procedurally defective, or, alternatively, denied.

II. Argument

A. The Petition For Reconsideration Is Procedurally Defective

The Petitioners' Petition For Reconsideration is late-filed, for the reasons set forth in Martin's November 18, 1992 Motion To Strike and in Martin's November 25, 1992 Reply To Opposition To Motion To Strike in this proceeding. Those two pleadings are hereby incorporated herein by reference. Accordingly, the Petition For Reconsideration must be summarily stricken without consideration, since the Commission has no jurisdiction to consider a late-filed petition for reconsideration, pursuant to Section 405 of the Communications Act.

In addition, the Petition For Reconsideration must be summarily dismissed as procedurally deficient, since it is little more than a rehash of the very same arguments that the Petitioners raised in their Reply Comments below (filed with the Commission on April 17, 1992). It is well-established that reconsideration will not be granted for the purpose of again debating matters upon which the Commission has already deliberated and spoken. WWIZ, Inc., 37 FCC 685 (1964), aff'd sub nom., Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966); Warren

Price Communications, Inc., 7 FCC Rcd 6850 (1992); Coastal Broadcasting Partners, 7 FCC Rcd 6594 (1992); Evergreen Broadcasting Company, 7 FCC Rcd 6601 (1992).

An additional procedural deficiency in the Petition For Reconsideration is presented by the fact that the Petitioners for the first time in their Petition supply an affidavit from their consulting engineer, Robert A. McClanathan. See Exhibit A to the Petition For Reconsideration. This affidavit and all arguments based on it should be summarily stricken without consideration, pursuant to Section 1.106(c)(1) of the Commission's Rules. In this regard, the new material contained in Exhibit A to the Petition For Reconsideration does not constitute facts which have occurred or circumstances which have changed since the filing by the Petitioners, on April 17, 1992, of their Reply Comments in this proceeding, nor does the newly proffered material consist of facts that were either unknown to the Petitioners until after the filing of their Reply Comments or which could not, through the exercise of ordinary diligence, have been learned by the Petitioners prior to the filing of their Reply Comments. The Court of Appeals has observed that a party cannot "... sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed." Colorado Radio Corp. v. FCC, 118 F.2d 24, 26 (D.C. Cir. 1941).

In short, the Petition For Reconsideration should be summarily dismissed; however, as shown below, even when considered on its purported "merits", the Petition For Reconsideration must be rejected as substantively arid.

B. The Petitioners Have Failed To Establish Any Basis For Reconsideration Of The Bureau's Report and Order Or For Initiation Of A Section 403 Investigation

Contrary to the Petitioners' suggestions, Section 403 of the Communications Act gives the Commission broad discretion in determining whether to institute a formal Section 403 investigation. See The New Continental Broadcasting Co., 87 FCC 2d 517, 49 RR 2d 1625 (1981); Stahlman v. FCC, 126 F.2d 124 (D.C. Cir. 1942). This broad discretion is to be contrasted with the mandate of Section 309(e) of the Communications Act, which requires the Commission to designate for hearing if a substantial and material question of fact warranting evidentiary inquiry is presented in connection with an application to which Section 309(a) of the Communications Act applies. Nonetheless, the Commission has held that it will refuse to pursue a formal Section 403 investigation in the absence of a substantial and material question of fact demonstrating that a licensee had violated the Communications Act or the Commission's Rules. Boston Broadcasters, Inc., 53 FCC 2d 494, 499 (1975).

It is well–established that, even when the Commission is assessing the sufficiency of a formal petition to deny, the proponent of such a petition must first set forth specific allegations of fact sufficient to show that "a grant of the application would be prima facie inconsistent with the public interest, convenience and necessity." 47 U.S.C. §309(d)(1). The Commission must proceed "on the assumption that the specific facts set forth [in the petition] are true..." for purposes of making this initial determination. Citizens for Jazz On WRVR v. FCC, 775 F.2d 392, 397 (D.C. Cir. 1985); Astroline Communications Company v. FCC, 857 F.2d 1556, 1557 (D.C. Cir. 1988). If, and only if, the Commission determines that the petitioning party satisfies this threshold standard, the inquiry proceeds to a second phase, under which the Commission must determine whether, "on the basis of the application, the pleadings filed, or other matters which it may officially notice a substantial and material question of fact is presented." Id. at 394. See also Gencom, Inc. v. FCC, 832 F.2d 171, 181 (D.C. Cir. 1987). If, and only if, the Commission concludes that such a substantial and material

question of fact has been raised, or if it cannot, for any reason, find that the grant of the application would be consistent with the public interest, is a hearing warranted pursuant to Section 309(e) of the Communications Act. See Cagal Cellular Communications Corporation, 6 FCC Rcd 285, 287 (1991); Columbia Bible College Broadcasting Co., 6 FCC Rcd 516 (Mass Media Bureau 1991).

The only issue in this channel allotment rulemaking proceeding is whether the public interest, convenience, and necessity would be served by grant of the particular channel allotment/channel upgrade approved in the Bureau's Report and Order. None of the arguments presented by the Petitioners address this central issue; rather, all of the contentions raised by the Petitioners deal with matters that have absolutely nothing to do with this central issue. Thus, the Petitioners' arguments are simply irrelevant and immaterial to the matters at issue in this proceeding.

In any event, there is simply no basis for the Petitioners' raw speculation that Danjon never intended to apply for and build a Prineville, Oregon, station. Indeed, this speculation by the Petitioners lacks any logical foundation.

In this connection, Petitioners attempt to make much about Danjon's mistaken assertion that its new channel proposal would bring a first service to Prineville. The Petitioners attempt to bootstrap this mistaken assertion into a baseless claim of misrepresentation. However, the Petitioners conveniently ignore the fact that:

> "Misrepresentation is an intentional misstatement of fact intended to deceive, which the Commission has likened to perjury and which, if commented before the FCC, could subject the perpetrator to criminal prosecution under 18 U.S.C. §1001."
>
> Silver Star Communications – Albany, Inc., 3 FCC Rcd 6342, 6349 (Rev. Bd. 1988).

See, also, Tequesta Television, Inc., 2 FCC Rcd 7324 (Rev. Bd. 1987) (an intent to deceive, which lies at the core of all misrepresentation–like issues, must be proven). Here, however, other than engaging

in raw speculation and surmise, the Petitioners have established no facts demonstrating that Danjon's mistaken assertion of first service to Prineville was an intentional misstatement of fact intended to deceive. The speculations by Petitioners that Danjon intended to deceive are nonsensical and without rational foundation; regardless of whether the Danjon proposal for Prineville would have represented a first, second, third, or even a tenth service, such fact would have made no difference whatsoever in the Bureau's decision to issue its Notice Of Proposed Rule Making under the facts of this case. Indeed, it should be noted that the Bureau itself stated in its Notice Of Proposed Rule Making, DA 92-27 (released January 21, 1992), that Danjon's channel proposal would bring a first local FM service to Prineville, Oregon. Id. at ¶2. Surely, Danjon ought not to be held to a higher standard of factual accuracy than the Commission itself.

If it were assumed, arguendo, that Danjon had intended to deceive the Commission by claiming that its proposal would bring a first local FM service to Prineville, any such effort at deception surely would have been doomed to failure, since, inevitably, the Commission itself and others (including any competitors in the market) could easily have discovered the number of FM facilities in Prineville. Danjon would have been foolish to knowingly misstate that it would bring a first local FM service to Prineville, since, inevitably, local competitors would have brought the true facts to the attention of the Commission in an effort to try to avert competition by opposing the allotment rulemaking proceeding.

Parties expressing an interest in a channel allotment are required to state a bona fide contention to apply for the channel if it is allotted, and, if authorized, to build the station promptly. See Notice Of Proposed Rule Making, supra; see also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses Of the Commission's Processes, 5 FCC Rcd 3911, 3914-15 (1990). Here, the Petitioners have failed to demonstrate that, when Danjon certified as to this intention in its November 28, 1991 Petition For Rule Making herein, and in its January 24, 1992 Comments

herein, such representations by Danjon were not bona fide when made. Indeed, the fact that Danjon promptly withdrew its Petition and Comments on March 18, 1992, when Highlakes Broadcasting Company -- one of the Petitioners -- made Danjon aware of existence of two stations in Prineville, strongly supports the conclusion that Danjon's original representation of its intent was bona fide and truthful when made. Danjon's prompt withdrawal of its statement of intent as to the Prineville allotment manifests a sensitivity by Danjon for the need to be candid and forthcoming with the Commission in relation to changes in circumstances which resulted in changes in Danjon's intent to proceed.[2] Nor have the Petitioners demonstrated that Martin's representation, in his March 9, 1992 Comments and Counterproposal, that he intended to apply for the upgraded Channel 281C1 in Sisters, Oregon, and to construct the modified facilities, was anything other than bona fide.

The Petitioners' failure to demonstrate that Danjon's statement of intent was anything other than bona fide when made is fatal to its claims. In this regard, even if it were to be assumed arguendo, that the filing of Danjon's Prineville proposal was coordinated in some fashion with the filing of Martin's Sisters, Oregon, proposal, that fact, standing alone, would be of no probative value and would not violate any Commission Rule or policy, provided that Danjon and Martin each had the requisite bona fide intent to apply for their respective channels, if allotted, and to construct the facilities if grants of authorization were issued by the Commission. There is no Commission rule or policy that precludes two otherwise bona fide petitioners for channel allotments to coordinate or arrange their respective filings so as to garner the greatest likelihood of both proposals being granted.

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[2] It should be noted that, if Danjon had not withdrawn its rulemaking proposal, the Highlakes Broadcasting Company opposition to the Bureau's Notice of Proposed Rule Making still would not likely have blocked Danjon's proposal, since the Commission does not normally decline to allot new channels to communities based solely on economic impact arguments of existing stations. Hence, if Danjon had not withdrawn its Prineville proposal, the Petitioners would have been deprived of all of their arguments based on the fact and intent of Danjon's withdrawal. The Bureau would thereupon likely have allotted to Prineville the alternate channel proposed by Martin, as well as the KPXA(FM) upgrade proposed by Martin -- the precise upgrade which is at the heart of the Petitioners' concern.

Notwithstanding the Petitioners' contentions to the contrary, such coordinated filings by two bona fide petitioning parties is not an abuse of process. The Commission has held that abuse of process in connection with channel allotment proceedings occurs where a channel allotment proposal is filed for the purpose of impeding, obstructing or delaying the grant of another channel allotment proposal. See Amendment Of Sections 1.420 and 73.3584 of the Commissions's Rules Concerning Abuses Of The Commission's Processes, 5 FCC Rcd 3911, 3914–15 (1990), reconsideration denied, 6 FCC Rcd 3380 (1991).[3] Where, however, both of the petitioning parties seeking channel allotments are bona fide in their intent to apply for their respective proposals and to construct the facilities if authorized, nothing in the above–referenced Amendment nor any Commission rule or policy is violated by coordination among the two parties as to their respective filings. Nor do the Petitioners cite to any rule or policy which is violated by such coordinated filings by otherwise bona fide petitioning parties. In essence, the Petitioners seem to be arguing in favor of a change in Commission rules so as to prohibit such coordinated filings among two otherwise bona fide petitioners in channel allotment rulemaking proceedings. However, any such request for a change in Commission rules should be addressed in a separate petition for rulemaking, rather than in the context of this channel allotment proceeding.

By contrast, the entire thrust of the Petitioners' arguments is to impede, obstruct and delay the grant and implementation of Martin's KPXA(FM) upgrade, in order to forestall competition in the market. What the Petitioners are really exercised about is that because Martin's proposal appeared as a counterproposal, they have been precluded from filing a strike petition or strike counterproposal that might otherwise have been filed by them or some "strawman" affiliate against Martin's rulemaking proposal for Sisters, Oregon had Martin filed for his upgrade in the first instance in a petition for rulemaking. The Commission has established that the filing of a strike petition will raise a substantial

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[3] In order to stem such abuses, the Commission therein imposed limits on the monetary payments that may be made in exchange for withdrawing counterproposals in channel allotment rulemaking proceedings.

and material question of fact as to whether the filer possesses the basic character qualifications to remain a Commission licensee. See Character Qualifications, 102 FCC 2d 1179 (1985), reconsideration denied, 1 FCC Rcd 421 (1986). Based on this standard, the Petitioners' filing of their Reply Comments in this proceeding, as well as their filing of their Petition For Reconsideration, can be seen as having no other purpose other than to impede, obstruct and delay this proceeding so as to forestall additional competition in the Bend, Oregon area. It is significant to note, in this regard, that, on November 20, 1992, the Petitioners opposed Martin's November 19, 1992 Petition For Declaratory Ruling, in which he requested that the Bureau expeditiously issue a declaratory ruling that the effectiveness of the Mass Media Bureau's October 7, 1992 Report and Order in this proceeding has not been automatically stayed, pursuant to Section 1.420(f) of the Commission's Rules. Obviously, it appears to be very important to the Petitioners to delay, for as long as possible, for their own private pecuniary purposes, the implementation of Martin's KPXA(FM) upgrade. This type of collusion by Petitioners, constituting virtually all of the Bend, Oregon, area radio stations, for the purpose of locking out competition raises substantial issues, not only under the Commission's abuse of process policies, but also under federal and state antitrust laws and other state laws.[4]

III. Conclusion

For the reasons set forth above, the Petitioners' Petition For Reconsideration is both procedurally defective and substantively devoid of merit. The Petitioners have failed to set forth specific facts sufficient to show that Grant of Martin's KPXA(FM) channel upgrade proposal was prima facie inconsistent with the public interest, convenience and necessity. The Petitioners have failed to demonstrate that either Danjon or Martin has violated any Commission rule or any provision of the Communications Act. Indeed, the Petitioners have merely succeeded in demonstrating that it is they themselves who have engaged in a manifest abuse of the Commission's process -- an abuse

[4] Martin is presently exploring his options in relation to seeking redress to vindicate his rights before the courts.

which continues with their filings in this proceeding. The Petitioners have failed to establish any basis for reconsideration of the Bureau's Report and Order in this proceeding or for initiation of a formal investigation under Section 403 of the Communications Act.

WHEREFORE, the forgoing premises considered, it is respectfully requested that the Petition For Reconsideration be summarily dismissed without consideration, or, in the alternative, denied.

Respectfully submitted,

SCHUYLER H. MARTIN

By _____
Irving Gastfreund

Kaye, Scholer, Fierman, Hays & Handler
901 15th Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 682-3526

His Attorneys

December 17, 1992

CERTIFICATE OF SERVICE

I, Mary Odder, a secretary with the law firm of Kaye, Scholer, Fierman, Hays & Handler, hereby certify that I have on this 17th day of December, 1992, sent copies of the foregoing "Opposition To Petition For Reconsideration" by First-Class U.S. Mail, postage prepaid, or via hand-delivery, as indicated below, to the following:

Roy J. Stewart, Esq. *
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 314
Washington, D.C. 20554

Robert H. Ratcliffe, Esq. *
Assistant Chief (Law)
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 314
Washington, D.C. 20554

Michael J. Ruger, Esq. *
Chief, Allocations
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 8322
Washington, D.C. 20554

John J. McVeigh, Esq. *
Fisher, Wayland, Cooper & Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037-1170
Counsel to Petitioners

Shelton M. Binstock, Esq.
1140 Connecticut Avenue, N.W.
Suite 703
Washington, D.C. 20036
Counsel to Danjon, Inc.

Mary Odder

*/ Via Hand-Delivery

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